No. 11,656

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RENALDO FERRARI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

This is an appeal from the judgment of conviction (Tr. 45) of the District Court of the United States for the Northern District of California, Southern Division, convicting the defendant subsequent to a trial without a jury before the Honorable Louis E. Goodman, United States District Judge, of a violation of the Jones-Miller Act. (21 U.S.C. Section 174.) The indictment (Tr. 2) was in 56 counts and charged the appellant and others with violations of the narcotic laws of the United States and with conspiracy. The appellant went to trial on three counts of this indictment, to-wit: Counts One, Thirty-nine, and Forty. Count One (Tr. 2) alleged in substance that the appellant and one Vincent Bruno, on or about the

5th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit: a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendant then and there knew. Count Thirty-nine (Tr. 20) alleged in substance that the appellant and one Frank Flier, on or about the 17th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew. Count Forty (Tr. 21) alleged in substance that appellant, one Vincent Bruno, and one Frank Flier, on or about the 28th day of January, 1946, in the City and County of San Francisco, State of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately one dram of heroin, and the said heroin had been imported into the United States of America contrary to law, as said defendants then and there knew.

The Court below had jurisdiction under the provisions of Title 26 U.S.C., Section 41, Subdivision 2. The jurisdiction of this Honorable Court is invoked under the provisions of Title 28 U.S.C., Section 225, Subdivisions (a) and (d).

STATEMENT OF FACTS.

The Federal Narcotic Agents testified that during the months of January and February 1946, they had under observation a barroom in the City and County of San Francisco, known as the Stardust Bar; that on the 5th, 17th and 28th days of January, 1946, they had secreted themselves in a room in the rear of the Stardust Bar, from which position they had at all times a liquor storeroom of the Stardust Bar under observation. At about 8:30 on the evening of January 5, 1946, the agents observed Frank Flier enter the liquor storeroom from the rear of the Stardust Bar with appellant. Flier removed a paper from between two beer cases where it was concealed, opened the paper, and using a knife, took some of the contents of the paper and with the knife sniffed the contents into his nostrils. Flier then passed the knife and paper to the appellant, who likewise sniffed some of the white substance into his nostrils. After receiving the paper from the appellant, Flier secreted the paper in its former place of concealment in the room.

At approximately 10:00 o'clock that same evening, two of the agents went into the liquor room

and took from this hidden paper a small quantity of the substance, which was later identified by a Government chemist as heroin hydrochloride. No one else disturbed the package between 8:30 and 10:00 o'clock P. M.

On the 17th day of January, 1946, at approximately 11:00 o'clock in the evening, the agents again went into the liquor room and took a sample of the package, which was subsequently identified as heroin hydrochloride. At approximately 11:30 o'clock that same evening Flier and the appellant once again came into the liquor room; Flier went over to the place of concealment and took out the paper; and both inhaled some of the white substance from the said package. Flier returned the paper to its hidden location. No one else had disturbed the package during the half hour interval between 11:00 and 11:30 o'clock.

On the 28th day of January, 1946, at about five minutes past 5:00 o'clock in the afternoon, Flier, together with one Vincent Bruno and appellant, came into the liquor room and removed the package from its concealed position. After Bruno and the appellant both inhaled the white substance from the knife, the package was again hidden by Flier.

At approximately 8:50 o'clock in the evening of the same day one of the agents once again removed some substance from the said package in the liquor room. A Government chemist later identified said substance as heroin hydrochloride. No one had disturbed the package between 5:05 P. M. and 8:50 P. M.

The above constituted the case of the Government.

The appellant was called as a witness on his own behalf. He testified that over the periods of time covered in the incident he had gone to drink and meet his friends at the Stardust Bar. On the night of January 5, 1946, he said he was in Palm Springs, California. The appellant denied that he inhaled any quantity of heroin or any other narcotic on the 17th and 28th days of January, 1946, although he admitted that he did go to the Stardust Bar to drink on said dates. Frank Flier and Vincent Bruno, called as defense witnesses, testified that they never saw the appellant use heroin on the dates testified to by the agents.

QUESTIONS.

I. Is the possession of narcotics for the purpose of use sufficient to justify conviction?

II. Was there a fatal variance between the allegations contained in Count One of the indictment and the evidence presented at the trial?

III. Did the appellant receive a fair trial before Hon. Louis E. Goodman?

ARGUMENT.

I. POSSESSION FOR PURPOSES OF USE IS SUFFICIENT TO JUSTIFY A CONVICTION.

The appellant argues that the government's evidence of his possession of heroin proved possession

for use only and therefore was insufficient to prove the offense under the statute (21 U. S. C. § 174).[1] The facts in the instant case are identical with the facts in *Pitta v. United States* (C.C.A. 9), 164 F. (2d) 601. In that case the defendant entered the same liquor room of the Stardust Bar with one Vincent Bruno under the observation of Federal Narcotic Agents. Bruno removed from some beer cases a paper containing the heroin in question. After inhaling some of the contents of the paper, Bruno handed the paper to the defendant, who likewise sniffed the narcotic. Defendant then refolded the paper and handed it to Bruno, who restored it to its hiding place. A few hours before this incident occurred, the Narcotic Agents had gone into the liquor room and taken a sample of the paper's contents, which was later identified as heroin. In this case, as in that case, the defendant only obtained possession for the purpose of use.

In affirming the conviction of the defendant in the *Pitta case,* this Court said:

> "Appellant was shown, certainly, to have had possession of the narcotic for an illegal purpose, namely, for use. We think that possession for use does not differ, in legal effect, from possession for any other illegitimate purpose, such as for sale or distribution. Possession of any sort is sufficient to raise the presumption and to place

[1] 21 U.S.C. 174: "* * * Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

upon the accused the burden of explaining the possession to the satisfaction of the jury. Ng Choy Fong v. United States, 9 Cir., 245 F. 305, certiorari denied 245 U.S. 669, 38 S. Ct. 190, 62 L. Ed. 539; Yee Hem v. United States, 268 U.S. 178, 45 S. Ct. 470, 69 L. Ed. 904. The aim of the statute is to stamp out the existence of narcotics in this country except for legitimate medical purposes. Yee Hem v. United States, supra. It follows that the evidentiary consequence flowing from proof of possession was here operative.

"We think, moreover, that independently of the presumption arising from unexplained possession there was evidence from which the jury might find that appellant participated in or facilitated the concealment of the narcotic."

Therefore, this Court in the *Pitta* case clearly holds that under the statute above cited, possession for use is sufficient to justify conviction.

II. THE VARIANCE BETWEEN THE ALLEGATION CONTAINED IN COUNT ONE OF THE INDICTMENT AND THE EVIDENCE PRESENTED WAS NOT FATAL.

Count One (Tr. 2) of the indictment alleged that appellant and one Vincent Bruno, on the 5th day of January, 1946, in San Francisco, California, fraudulently and knowingly concealed and facilitated the concealment of one bindle of heroin. The evidence introduced by the Government showed that one Frank Flier was present when the appellant committed the offense charged in the indictment. Such a variance is not fatal in this case.

Section 269 of the *Judicial Code,* as amended, 28 U.S.C.A., Section 391, provides:

> "On the hearing of any appeal, certiorari, writ of error, or motion of a new trial, in any case, civil or criminal, the Court shall give judgment after an examination of the entire record before the Court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

In *Berger v. United States,* 295 U. S. 78, 55 S. Ct. 629, 630, 79 L. Ed. 1314, a criminal case dealing with variance, the Court said:

> "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense. Bennett v. United States, 227 U. S. 333, 338; Harrison v. United States, 200 Fed. 662, 673; United States v. Wills, 36 F.(2d) 855, 856-857. Cf. Hagner v. United States, 285 U. S. 427, 431-433.
>
> "Evidently Congress intended by the amendment to § 269 to put an end to the too rigid application, sometimes made, of the rule that error being shown, prejudice must be presumed; and to establish the more reasonable rule that if, upon an examination of the entire record, substantial

prejudice does not appear, the error must be regarded as harmless. See Haywood v. United States, 268 Fed. 795, 798; Rich v. United States, 271 Fed. 566, 569-570."

The appellant in this case had such information as to the charges against him so that he was able to present his defense and was not taken by surprise by the evidence offered at the trial. Appellant's defense to Count One was his testimony that he was in Palm Springs, California, on the evening of the 5th of January, 1946, and, therefore, could not have been present in the rear liquor room of the Stardust Bar in San Francisco, California. It was therefore not material to his defense that a variance appeared in Count One regarding the name of the man who was present when the appellant possessed the heroin for the purpose of use. It was the allegations regarding time, place and acts that were material and important to appellant's defense.

Nor could the appellant again be prosecuted for the same offense because of this variance. It must be recalled that Count One was not a conspiracy count and that Count Fifty-six, which alleged a conspiracy, was dismissed. Nor was this a count alleging a sale between appellant and another person. The presence of another person was not essential to the proof of appellant's guilt. The agents' testimony was that the appellant took the knife and inhaled the heroin from it. From this evidence establishing possession for use arose the statutory presumption that was sufficient to authorize a conviction. In short, the name of the other

person present was not essential to the description of the offense.

III. THE APPELLANT RECEIVED A FAIR TRIAL BEFORE HON. LOUIS E. GOODMAN.

On April 22, 1947, in the case of *United States v. Frank Flier,* No. 30073-G (United States District Court, Northern District of California, Southern Division), Hon. Louis E. Goodman had heard testimony from Narcotic Agent William Grady for the purpose of determining Flier's sentence. The agent made incidental reference to appellant when he testified, "At the time he was in the Vagabond Club he was associated with Renaldo Ferrari, Stanley Paliwode, Walter de Argorio and several other people who are known to our office as narcotic violators." (Supp. Tr. 172). And later the agent made another reference to appellant when he testified, (Supp. Tr. 181):

> "The only thing that I can recall to mind right now is that the night before Flier was arrested they were dividing up the profits. There was Ferrari and Bruno and Belleci—or Flier, Bruno and Ferrari—and they divided the money equally on that occasion, although that was not a very large deal."

Appellant contends that this evidence which the trial judge received was almost certain to prejudice him against appellant in appellant's trial commencing the next day, and that if counsel for appellant had known of the agent's testimony in the *Flier* case, he would have filed an affidavit of bias or prejudice for

the purpose of disqualifying the Honorable Louis E. Goodman, and he would have urged this incident in the *Flier* case as ground for granting his motions for a new trial and in arrest of judgment.

Appellant was not deprived of a fair trial because the trial judge heard the above quoted testimony in the *Flier* case. A reading of the record of the case before this Court indicates most convincingly that appellant received all the protection to which he as a defendant is entitled under the Constitution and the laws of the United States. His trial before the Court without a jury was of his own choosing. Nowhere in the record is there found any conduct on the part of the trial judge which would indicate prejudice toward appellant or a prejudgment of this case. The fact that the trial judge had heard the above quoted testimony from the *Flier* case is not sufficient to overcome the well established presumption that a judge has properly performed his dutes incident to a conviction. *Hall v. Johnston* (C.C.A. 9), 91 F.(2d) 363, at 364.

Nor would the Honorable Louis E. Goodman have been compelled to disqualify himself from hearing this case if appellant had filed a timely affidavit of prejudice and bias based on the testimony of the *Flier* case. Section 21 of the *Judicial Code,* 28 U.S.C. Sec. 25, provides for the disqualification of a judge for *personal* bias or prejudice. It has been held that when an affidavit charges a bias and prejudice grounded on evidence produced in a prior judicial proceeding before the same judge, such bias and prejudice is not personal and is not sufficient to disqualify. *Craven v.*

United States, 22 F.(2d) 605; *Parker v. New England Oil Corporation,* 13 F.(2d) 497.

In the *Craven* case, the Court said:

> "'Personal' is in contrast with judicial; it characterizes an attitude of extra-judicial origin, derived *non coram judice.* 'Personal' characterizes clearly the prejudgment guarded against. It is the significant word of the statute. It is the duty of a real judge to acquire views from evidence. The statute never contemplated crippling our courts by disqualifying a judge, solely on the basis of a bias * * * against wrongdoers, civil or criminal, acquired from evidence presented in the course of judical proceedings before him."

The facts urged by appellant as sufficient to disqualify the Honorable Louis E. Goodman are even less indicative of prejudice and bias than the allegations presented by the defendants in the cases above cited. In this case the trial judge heard testimony which included an incidental reference to the appellant. In each of those cases cited, the trial judge's conduct at the prior proceeding indicated he had formed a firm opinion of the case from the evidence presented. Certainly if the affidavits of prejudice and bias were held insufficient to disqualify in the two cases cited, any affidavit filed by appellant would have been ruled insufficient.

The evidence in this case being sufficient to justify a conviction, there is no ground upon which the decision of the Court below can be properly disturbed.

CONCLUSION.

For the reasons stated, we respectfully submit that the conviction should be affirmed.

Dated, San Francisco,
April 30, 1948.

Respectfully submitted,

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